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HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 306

LILLIAN AGNES WIELAND and
CHARLES L. WIELAND,
Petitioners,

against

C. A. SWANSON & SONS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MISCELLANEOUS CITED

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To the Honorable Earl Warren, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Lillian Agnes Wieland and Charles L. Wieland, the plaintiffs-appellants in the above entitled and numbered cause, respectfully pray that a writ of certiorari may issue to the United States Court of Appeals for the Second Circuit to review a judgment of affirmance of that Court of the judgment of the United States District Court for the Southern District of New York, entered on a jury verdict for the defendant, and in support thereof petitioners respectfully represent:

That the opinion and judgment rendered by the United States Court of Appeals for the Second Circuit on June

1, 1955, under the number 271 is erroneous, contrary to the law and the evidence, and prejudicial to the interest of petitioners and the general food-consuming public, and that the judgment should be reversed by this Court.

Opinions Below

That the judgment and opinion rendered in the United States Court of Appeals for the Second Circuit on June 1, 1955, which has not yet been reported appears fully in the appendix infra.

That after rendition of the said judgment of affirmance on June 1, 1955, an application for rehearing was denied on June 23, 1955.

Jurisdiction

That this Court has jurisdiction of the subject matter hereto for the reason that it involves the judgment of the United States Court of Appeals for the Second Circuit and is a suit by citizens of the State of New Jersey for more than $3,000 against a Nebraska Corporation.

Reasons for Granting the Writ

Under Rule 19 of the Revised Rules of the Supreme Court of the United States concerning jurisdiction on writ of certiorari, this Court at its discretion may entertain this petition for certiorari and is urged to on the following grounds:

(a) If the decision of the United States Court of Appeals for the Second Circuit is allowed to stand it will impose an unreasonable if not an impossible burden of proof upon any prospective plaintiff in a food case where the alleged negligence of the defendant involves natural content or substance, and defendant's dereliction in the canning or packing of same. The

packing and canning of food products is a matter of national interest.

(b) Further, if the decision of the United States Court of Appeals for the Second Circuit is allowed to stand, the petitioners and the general public would be greatly prejudiced, as the canner or packer of a food product would be greatly immunized from any liability in connection with negligence or dereliction in its canning or packing processing so long as said negligence or dereliction involves the condition of the natural content or substance of the product. The supplying of food by canners and packers to the consuming public is a matter of great national interest.

(c) The judgment of affirmance of the Court below, allegedly based on plaintiffs' insufficient proof, involves a direct conflict with leading food cases, including those of the State of New Jersey. The Court has decided an important state question in a way in conflict with applicable New Jersey State Law and in doing so has departed from the accepted and usual course of judicial proceedings, including denying petitioners their inherent right to have a proper issue of fact submitted to a jury, and, or by affirming and sanctioning such a departure by the District Court from all standards set in food cases as to call for the exercise of this Court's power of supervision.

Specification of Errors

I

The United States District Court erred in not allowing the jury the decision as to whether the plaintiffs could recover if the injury suffered by the petitioner was caused by the presence of (1) a splintered bone, or, (2) a small regular, hard, sharp bone not expected to have been found in the small, unattached piece of white meat, less than one inch in diameter, which was testified to by the plaintiff as having been ingested.

II

The Judge of the District Court erred when he charged, as he did, on page 179 of the appellants' appendix to brief, that plaintiffs could not recover if the injury suffered by Mrs. Wieland was caused by a splintered chicken bone.

III

The District Court further erred in its method of handling this case, and its submission thereof to the jury was so prejudicial to the plaintiffs' case as to constitute reversible error. At the beginning of the trial, the Judge of the District Court ruled in effect that the issue be confined to whether or not a chicken bone caused the injury and, near the end of the trial, a ruling that plaintiffs could recover only if the jury found that the injury was caused by a substance other than a chicken bone. This instruction to the jury meant that assuming that the plaintiff's injury was caused by a splintered chicken bone which was imbedded in a small piece of white meat taken from the can, regardless of the method of processing, there could be no recovery because chicken bone is part of a chicken and must be expected to be found in chicken. The Court's charge was equivalent to saying to the jury that it made no difference whether or not any care was taken to keep splintered, or small, regular, hard, sharp bones out of the product. The Court in effect said to the jury that as a matter of law under no circumstances or conditions could plaintiff recover if the damage was caused by a chicken bone.

IV

The Court of Appeals for the Second Circuit in its opinion of affirmance clearly was in error when it failed to recognize that the plaintiff's proof was sufficient to present a jury question as to the negligence of defendant in the processing and preparation of its canned product. A jury

should have been logically permitted to infer want of due care by the defendant, as to whether the defendant's negligent processing and preparation resulted in the presence of (1) a splintered bone, (2) a small, regular, hard, sharp bone, or, (3) any other foreign substance not expected to have been found in the small unattached piece of white meat less than one inch in diameter, which was testified to by the plaintiff, Lillian Agnes Wieland, as having been ingested.

V

The Circuit Court in its opinion of affirmance further erred when it concluded that the record and proof herein supplied no evidentiary basis for a logical inference by a jury. The basic fact was clearly established. The proof conclusively developed the *effect* from the swallowing of a piece of unattached white meat, less than one inch in diameter, followed by immediate gagging, the almost immediate X-ray examination of the esophagus, the determination "foreign body in the esophagus", the subsequent testimony of the physicians that such an injury could only have been caused by the "hard, sharp cutting of a foreign body", the interrogatories procured and introduced by the plaintiffs as to the preparation of defendant's products, and the absence of explanation or defense on the part of the defendants. From the proof adduced, an inference could logically be drawn by a jury that the cause of the effect testified to came from the defendant's can; that the defendant's can was defectively packed and thus constituted negligence which was the proximate cause of plaintiff's injury.

VI

The Circuit Court erred further when it concluded that under the circumstances herein plaintiff's proof constituted the submission of alternative possibilities to a jury for speculation. The element of speculative choice in the submission of alternatives to a jury only arises when the

injury complained of could have been occasioned by one o two causes, for one of which the defendant would not b responsible. The plaintiffs' proof adduced here present no such problem. The defendant could logically be hel responsible for negligence in the packing of its produc whether the injury was caused by a small bone in an shape or form, splintered or regular, or any other foreig substance, so long as same was imbedded in the smal unattached piece of white chicken meat less than one inc in diameter and unexpected to be found therein. Th plaintiffs' proof herein clearly showed that the jury shoul have been allowed to draw a logical inference from th proven fact and that the nature of the foreign body ingeste was not speculative but a proper determination of fact fo a jury.

VII

The Court of Appeals for the Second Circuit take judicial notice of the fact that a chicken contains man small bones less than one inch in length, but the Cou erred when it did not take further judicial notice that th defendant could be considered negligent if a small bone wa found imbedded in an unattached piece of chicken les than one inch in diameter, the unattached piece of chicke not being connected to any chicken part, such as a leg, win etc., where bones are inherently found.

VIII

The three cases which the Court of Appeals for the Se ond Circuit cited as controlling authority in its opinion affirmance are clearly distinguishable from the case at ba They are distinguishable on their proofs, both as to the la and facts therein. The Court in its decision failed to appl the various rules and tests of leading food cases regardi the sufficiency of proof necessary as a basis for the infe ence of negligence.

Statement of the Case

This is an action to recover damages for personal injuries suffered by petitioner-plaintiff, Mrs. Lillian Wieland, as the result of her ingesting either a splintered chicken bone or a small, regular, hard, sharp, chicken bone, or other foreign substance contained in a can of chicken fricassee prepared, processed, and distributed by the defendant, a packer and canner of food products.

The petitioners' cause of action is based on the following uncontradicted facts:

On October 3, 1949, petitioners purchased at the Acme Market in Madison, New Jersey, two cans of "Swanson Chicken Fricassee", a product ready for use except for heating.

On October 24th, Mrs. Wieland opened one of the cans to prepare lunch for herself and an adult daughter, She poured the contents into a clean aluminum pot and heated it. With a large soup spoon she put the contents on two plates. She then proceeded to eat from one of the plates with her fork, placing a small piece of unattached white meat, less than one inch in diameter, in her mouth. On the very first ingestive attempt she started to gag and choke.

The family physician, Dr. Graft, was called by Mrs. Wieland's daughter and arrived in about ten minutes. He examined her throat and concluded that "she had swallowed some foreign substance that had stuck in her esophagus". He sent her at once to the Morristown Memorial Hospital for X-rays. Accompanied by her daughter, she went to the hospital, still gagging and choking. X-rays were taken.

Dr. Graft received a report from the hospital that "there was a body in the esophagus that more or less was hinged on some sort of obstruction in the upper esophagus area".

Mrs. Wieland was then referred from Memorial Hospital to Dr. N. W. Burritt, an eminent ear, nose and throat surgeon. Dr. Burritt directed that the patient come at once to the Overlook Hospital. Mrs. Wieland was still gagging and choking and suffering excruciating pain in her throat, when Dr. Burritt operated that evening. A second operation took place on November 4th. Mrs. Wieland was in critical condition and almost died. She had a drain in her neck and a tube in her nostrils that extended to her stomach, through which she was fed. She was also fed intravenously.

Following the operation, she suffered many after effects and required constant nursing care and medical supervision.

At the end of the trial (March 1954) she still suffered from pain and trouble with her throat, a sensation of constriction when she attempted to eat. She felt insecure and afraid she was going to choke. Prior to the accident, her health was good. The out-of-pocket expense totalled in excess of $8,000.

The medical testimony of Dr. Graft and Dr. Burritt as read showed that Mrs. Wieland suffered an acute rupture of the esophagus, with an abscess extending down into the mediastinum, and further that the cause of the tear or rupture was the passing down of a foreign body.

Dr. Burritt testified that his primary diagnosis was a "foreign body in the esophagus". The final diagnosis was a tear of the right side of the esophagus through the crico-pharyngeus muscle and mediastinitis; that the cause of the injury was "a chicken bone in the esophagus". It was Dr. Burritt's opinion that the injury was caused by "a foreign substance as a result of the eating of the contents of the can". He defined a foreign body or substance as "any foreign matter which is of sufficient size and hardness to become

lodged." The chicken bone was not found. Dr. Burritt stated the reason for this was "because the chicken bone would have softened in stomach in the hydrochloric acid sufficiently so that it could not be identified as such at the anus. The stomach will dissolve a chop bone. You know, it has a high hydrochloric acid content."

Dr. Burritt stated that the tear Mrs. Wieland had in the left pyriform sinus could only be caused by a hard, sharp cutting of a foreign body. He stated that a forkful of chicken could contain such a piece of bone.

Dr. Richard A. Graft testified in detail as to the treatment and care of the patient.

Dr. Graft said: "I believe that the torn esophagus came about from a foreign body, probably a chicken bone, which was ingested from the contents of what she had eaten."

Details concerning the preparation and processing of the defendant's product was presented through interrogatories propounded by the petitioners. They showed the cutting of uncooked chicken meat and bones by machines and the packing and sealing in cans prior to cooking. The fact that there is a rigid visual inspection made in order to find and exclude parts of chicken containing fragmented bones; that small unattached pieces of meat are added to the cans in order to bring their weight up to a uniform standard.

The defendants offered no defense at either the first trial, or on the retrial. The jury in the prior trial decided in favor of the supermarket defendant and disagreed as to the liability of this defendant-respondent, the manufacturer and packer, C. A. Swanson & Sons (eight for the plaintiff, three for the defendant, and one undecided). The jury was permitted by the Court to decide whether the defendant's negligence was the presence of (1) a splintered

bone, (2) a small, regular, hard, sharp bone, or (3) any other foreign substance not expected to have been found in the small unattached piece of white meat, less than one inch in diameter, which was testified to by the plaintiff as having been ingested.

On the retrial, the results of which were affirmed by the judgment of the Court of Appeals for the Second Circuit, the District Court sent the case to a thoroughly confused jury. The Court had in effect first ruled that plaintiffs must confine their efforts to proving that the injury was caused by a chicken bone and not by a piece of metal or other matter foreign to chicken, and later the Court completely changed its position and instructed the jury that plaintiffs could in no event recover if the damaging instrumentality was chicken bone and must recover, if at all, only if it was metal or other substance.

It has always been the contention of the petitioners that they were not under obligation to elect whether the object that caused the injury was a splintered bone, a small, regular, sharp, hard bone, or any other foreign substance not reasonably expected to have been found in the small unattached piece of white meat, less than one inch in diameter, which was testified to by the plaintiff as having been ingested, but that they were entitled to present the facts just as they happened, and the conclusions of the doctors, and that then it was the proper function of the jury to logically infer from the proven fact want of due care and say whether the injury was caused by bone or metal or neither.

ARGUMENT

A. Proper Jury Question

A proper issue of fact was presented which should have been submitted to the jury. It was error for the Trial Court to take from the jury all consideration of whether the processing and canning of the defendants' chicken product was such that it might result in splintered bones

etc., being sealed into cans with no inspection thereafter and no chance of discovery except upon eating.

Wood v. *Waldorf System*, 83 Atl. (2d) 90, has a striking similarity in fact with the case at bar. It is a decision of the Supreme Court of the State of Rhode Island rendered in 1951. A restaurant customer ordered a bowl of chicken soup. After a few spoonfuls she began to choke. A chicken bone was dislodged from the customer's throat by the cashier putting her finger into the throat and the bone went down into the stomach.

In the *Wood* case the argument was made that the chicken bone was natural to the product and therefore no action resulted from the injury. The Court said:

> "Assuming that chicken bones are natural to and are used in the preparation of such soup, we do not think that it is necessary, natural or customary that harmful bones be allowed to remain concealed in this type of soup as finally dispensed to a customer, so as to relieve the purveyor of such food of all responsibility. In our judgment the question is not whether a substance may have been natural and proper at some time in the early stages of preparation of this kind of soup, but whether the presence of such substance, if it is harmful and makes the food unfit for human consumption, is natural and ordinarily expected to be in the final product which is impliedly represented as fit for human consumption."

The Court also said:

> "Unless we hold that defendant is under no duty to use ordinary care in the serving of such soup so that it is free from harmful, concealed and unexpected bones, and that the customer on the other hand is under a duty to anticipate the presence of such bones and to protect himself, then the evidence here, unexplained in any way, would support some inference inconsistent with defendant's exercise of ordinary care. Conceivably the weight to be given such an inference will vary with circumstances, depending upon the nature of the food and of the harmful substance, the established custom to be expected by the patron in connection with the serving of such food, and the relation of these

elements to the other facts in evidence. But the weight to be given such inference in a proper case is for the jury to determine."

Another paragraph in the same opinion is worth quoting:

"The cases relied upon by defendant do not concern such liquid types of food as here, and more important appear to be governed by the law of their respective jurisdictions. In effect they seem to relieve the purveyor of food practically of all duty to use ordinary care where the substance complained of is not entirely foreign to the preparation and serving of the food, thus casting on a patron the burden to anticipate and protect himself against the presence of such foreign substances in the food. In our opinion those cases are not in harmony with the rule followed in a majority of jurisdictions, and also in this state as to the duty of a purveyor of food in an action on the case for negligence based on the presence of harmful or deleterious substances in food which defendant impliedly represents as fit for human consumption."

Bonenberger v. *Pittsburgh Merc. Co.*, 345 Pa. 559, 28 Atl. (2d) 913, is also interesting.

In that case plaintiff purchased a can of oysters and was injured because of ingesting the oyster shell. Plaintiff sued the seller. The argument was made that the presence of the shell in the can of oysters did not make it unfit for human consumption, contending that shells were part of the oyster and it was absolutely impossible to be 100% sure that all shells were eliminated from the contents of the cans.

The Court held that the question of whether or not the presence of the shell in the can made it unfit for human consumption was a question of fact for the jury. It said:

"We cannot say as a matter of law that the product furnished the plaintiffs was reasonably fit for human consumption."

And in *Rosenberry* v. *Wachter*, 33 Del. 253, 138 Atl. 273, plaintiff was served with a plate of chicken soup which

contained a chicken bone that stuck in her throat. The question of negligence on the part of the defendant was held to be a question of fact for the jury.

See also *Davis* v. *Van Camp Co.*, 189 Iowa 775, 176 N. W. 382, wherein the Court determined an issue of fact involving canned goods:

> "We make a distinction between food products which are canned, bottled, or wrapped in such a way that the contents and the conditions thereof may not be known to the purchaser until opened for use by the customer and products which are not so put up, and the condition of which is observable."

B. Sufficiency of Proof

Petitioners sustained the burden of proof required in a food case for a logical inference of negligence and liability by a jury.

New Jersey Authorities

In *Schumann* v. *Horn & Hardart Packing Co.*, 8 N. J. Super. 153 (App. Div., 1950), the Court stated:

> "* * * the law imposes the burden of proof upon the plaintiffs and this burden must be sustained by showing circumstances from which the defendant's negligence is a reasonable and legitimate inference. In the discharge of this burden, if the plaintiffs produce any facts which justify such an inference when viewed, as they must be, most favorably to their contention, then the case should have been sent to the jury for determination."

And in *Austin* v. *Penn. R.R. Co.*, 82 N. J. L. 416, 81 A. 739, the Court stated:

> "All that is required is that the circumstances should be so strong that a jury might properly on grounds of probability rather than of certainty exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and when probability may be all that is attainable."

One of the leading food cases in New Jersey is *Tomlinson* v. *Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314. Among other things, the Court said:

> "Canned goods are at the present day in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test either of the retailer or of the customer until they are opened for use, and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption he in effect represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances the fundamental condition upon which the common-law doctrine of caveat emptor is based that the buyer 'should look out for himself'—is conspicuously absent, for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result, from general and fundamental principles, that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and are not unwholesome and poisonous."

Another one of the leading cases in New Jersey is *DeGroat* v. *Ward Baking Co.*, 102 N. J. L. 188, 130 Atl. 540, where the Court said:

> "Fundamentally it is claimed that there was no duty owing from the baking company to the consuming public. This proposition of law we have definitely declined to adopt. In Tomlinson v. Armour, 75 N. J. L. 748, it was held that one situated as was the appellant in preparing food for public consumption is under a duty to those for whose use it is intended to exercise reasonable care to see that it is free from substances injurious to the human body."

See also:

Danker v. *Fischer Baking Company*, 5 N. J. Super. 248, 68 Atl. (2d) 774.

Amabile v. *Kramps,* 121 N. J. L. 219, 2 Atl. (2d) 178.

Cassini v. *Curtis Candy Co.,* 113 N. J. L. 91, at p. 95 and p. 96.

Carbone v. *California Packing Corp.,* 12 N. J. Mis. 209, 169 Atl. 866.

See also *Bissonette* v. *National Biscuit Co.,* 100 Fed. (2d) 1003, a leading food case in which a judgment was secured by the plaintiff and affirmed by the U. S. Court of Appeals for the Second Circuit. As in the case at bar, the purchase (loaf of bread) was not opened until the customer was about to use same. The Court determined that the testimony required the case's submission to the jury to determine whether the manufacturer had sold food unfit for human consumption and was negligent in its baking and subsequent sale to the retailer to be resold to the public for consumption.

The Court said:

"What are reasonable precautions depend on the circumstances. Appellant must take precautions which careful and prudent bakers would take under similar circumstances (citing authorities). In the case of foodstuffs, a higher degree of care is normally required of the producer than is usually made applicable in other charges of negligence. The reason for this is apparent. The greater the danger to the public if the article is not carefully prepared, the more exacting becomes the law, that every possible precaution be taken. The history of this doctrine and its various applications is authoritatively traced and given expression in MacPherson v. Buick Motor Co., 217 N. Y. 382."

And the Court further said:

"As applied to foodstuffs, the rule simply requires reasonable care, but as stated, reasonable under the circumstances. In addition to the details of the usual baking practice, the circumstances to be taken into consideration include the fact that the food is prepared for consumption in its existing state so that it should be free from impurities which are dangerous to health

since the consumer is ordinarily unable to examine the food and normally cannot be expected to do so. Thus, normal use of food containing impurities or foreign particles results in a reasonable certainty of personal harm to the consumer and, where harm does result, it is actionable" (citing authorities).

And the Court further said:

"The learned trial judge properly and adequately stated in his charge: 'As the danger increases from dangerous things getting into the bread, the law increases the care and prudence required of the defendant to keep such things out of it—as the danger increases, the care increases: when the danger is great the law requires great care to prevent it'."

At page 1005 the Court said:

"Usually, the burden of proving the negligent acts of a defendant is upon the plaintiff. Under some circumstances, the quantum of proof which a plaintiff must supply is lessened. This is particularly true where the facts before the court show that there is a small degree of probability that a plaintiff's actions were responsible for the injury and that the article consumed was exclusively in control of the defendant."

See also:

Armstrong v. *Fiato,* 279 App. Div. 685.
MacPherson v. *Buick Motor Co.,* 217 N. Y. 382.

C. Court of Appeals Authorities Distinguished

The petitioners' proof did not constitute the submission of alternative possibilities to a jury for speculation. The three authorities relied on in the opinion of affirmance of the Court of Appeals for the Second Circuit are clearly distinguishable from the case at bar on both their law and facts.

Woschenko v. *C. Schmidt & Sons* (1949), 2 N. J. 268, 66 A. 2d 159, was an action by a guest at a party for injuries received when a barrel of beer, brewed by one defendant and sold by another distributor defendant, exploded.

The issue clearly defined was, assuming negligence on the part of both defendants, was the proof sufficient to present a jury question as to whether the negligence of either or both was the proximate cause of the accident? The Court held that there were many palpable and efficient agencies intervening between the defendant's alleged dereliction and the injury, and that therefore the chain of causation was broken. Further, the Court held that the plaintiffs presented no proof as to certain items, such as pressure in the barrel, etc., and that the accident could have been the probable cause of the negligence of either of the defendants and therefore the jury was left in the realm of speculation.

Dunn v. *Hoffman Beverage Co.* (1941), 126 N. J. L. 556, 20 A. 2d 352, was an action against a manufacturer and bottler of carbonated beverages for injuries caused by the bursting of a bottle some time after the purchase from the retail dealer, and where it appeared from the testimony adduced that the bottles after they passed through the defendant's processes would not burst unless there was careless handling from the warehouse to the retailer, or in handling by the retailer. This case turned on the speculative item of intervening factors breaking the chain of causation. Plaintiff offered no proof as to the length of time the bottle was in the custody of the retailer at the time of resale, or as to the condition of the bottle at the time of purchase, how it was kept, or what, if anything, happened to it from the time it was delivered up to the time it was sold to the infant plaintiff therein. The Court held, after considering a full defense by the defendant as to its bottling processes and testing, etc., that it was just as probable to infer that the strength of the bottle had been weakened while in the custody of the retailer as it was to infer that the defendant had been negligent in the bottling.

Simpson v. *Duffy* (1952), 19 N. J. Super. 339, 88 A. 2d 520, was an action against a self-service market for injuries sustained by plaintiff when she allegedly slipped on a

vegetable leaf on the floor and fell. The plaintiff's proo failed to establish notice as to the length of time the lea was on the floor in order to have been discovered an removed if the defendant had exercised its duty of reason able inspection. Intervening factors again were held t have been the cause of speculation for the jury as to th proximate causation and responsibility.

The above authorities relied on by the Court in it opinion of affirmance are distinguishable from the proo in the case at bar. The proofs adduced in those case present the alternative possibility of one or the other o actual or potential defendants being responsible for th cause of injuries, forming an insufficient evidentiary basi for choice by logical inference. In addition thereto is th presence of intervening agencies cutting the chain o proximate causation and ground for speculation as to th ultimate responsibility. The case at bar is a canned foo case with but a single packer defendant involved. Thi defendant exercised actual control over the contents o its product until the opening of the can; its preparatio remained undisturbed. The case at bar is more in lin with the following New Jersey cases, which are cited an discussed in the three cases regarded as controlling by th Court and distinguished therein.

See:

Taylor v. *Berner,* 7 N. J. R. 597, 146 A. 674 (Sup Ct., 1929), aff. Err. and App. 1920, N. J. L. 46 150 A. 371.

Healy v. *Trodd,* 124 N. J. L. 64, 11 A. 2d 88 (Er and App. 1940).

D. Conduct of Trial Court Reversible Error

Appellants' Appendix to Brief, containing a complet stenographic transcript of events and proceedings in th trial court (submitted in the Court of Appeals) clearl shows that the jury was thoroughly confused when th District Court ruled, first, that petitioners must confin their efforts to proof that the harmful instrumentality wa

a bone and then ruling that petitioners could go to the jury only on the possibility that the injury was caused by something other than bone.

As an example, immediately before the luncheon recess, just prior to summation, the Court stated at folio 480: "* * * I am going to give the jury the case triple barrel on the possibility of the harmful object being a bone, secondly a splintered bone, and thirdly, something that was hard and sharp and foreign."

And at the very beginning of the afternoon session the Court then stated: "I have come to the conclusion, I wanted to advise you before you started to sum up to the jury, that I am going to instruct them that if the damage was done by a chicken bone, they have to bring in a verdict for the defendant. And they have to find some other object instead in order to bring in a verdict for the plaintiffs. * * *

"(Addressing Mr. Raftery) I am sorry for you, because I feel partly responsible. As I said earlier, maybe I derailed you yesterday, etc." (ff. 488-489).

See also: folios 84 through 89, 460 through 462, 465, 466, 480, 488, 489, 497, 498, 499, 505, 506, 536, 538 through 540 and 548.

And the jury was further confused by the Court's handling of the theory of petitioners' case, including "Representation as confused with Warranty".

See: folios 89, 90, 322 through 326 and 509.

The definition of the term "foreign body" as constituting the harmful instrumentality caused further confusion.

See folios 340, 344 through 350.

CONCLUSION

The questions presented by this petition are of great and recurring significance. Serious questions of public policy concerning the national interest are involved here and the effect of the decision affirmed below if not reversed

makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reason set forth above, petitioners respectfully pray that this Court do issue a writ of certiorari to the United States Court of Appeals for the Second Circuit and that in due course the judgment of the United States Court of Appeals for the Second Circuit shall be reversed and that this cause should be sent back to the United States District Court for the Southern District of New York, with instructions for its hearing in a new trial, and petitioners pray further for general and equitable relief.

Respectfully submitted,

O'Brien, Driscoll & Raftery,
Counsel for Petitioners,
152 West 42nd Street,
New York 36, N. Y.

Arthur F. Driscoll,
George A. Raftery,
William D. Friedmann,
of Counsel.

Certificate

We certify that a copy of this petition has been served on Breed, Abbott & Morgan, attorneys for respondent, by personally delivering a copy hereof to them this 8th day of August, 1955.

O'Brien, Driscoll & Raftery,
By George A. Raftery.

APPENDIX

Opinion of the Court—Filed June 1, 1955

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 271

OCTOBER TERM, 1954

Docket No. 23134 Decided June 1, 1955

LILLIAN AGNES WIELAND and
CHARLES L. WIELAND,
Plaintiffs-Appellants,

v.

C. A. SWANSON & SONS,
Defendant-Appellee.

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, Judge.

Lillian Wieland and her husband Charles Wieland have sued C. A. Swanson & Sons for injury to Lillian Wieland's throat caused by some hard sharp object said to have been negligently included in chicken fricassee processed and prepared by Swanson & Sons. The Wielands appeal from a judgment entered on a jury verdict for the defendant. Affirmed.

GEORGE R. RAFTERY, New York City (O'BRIEN, DRISCOLL & RAFTERY and GEORGE A. RAFTERY, New York City, on the brief), for plaintiffs-appellants.

J. CHRISTOPHER MEYER, JR., New York City (BREED, ABBOTT & MORGAN and THOMAS W. KELLY, New York City, on the brief), for defendant-appellee.

HASTIE, *Circuit Judge:*

Plaintiff wife was injured by swallowing, in a mouthful of canned chicken fricassee, some object which was hard and sharp enough to tear the lining of her esophagus. She and her husband sued the manufacturing processor on the theory that the injurious substance was introduced or permitted to remain in the chicken fricassee through the negligence of the processor. The Court charged the jury that if it found that the injury was caused by a chicken bone, plaintiffs could not recover.[1] The jury verdict was for defendant and plaintiffs appeal.

The place of wrong was New Jersey. Both parties have addressed themselves to the problem of the extent of a manufacturer's liability for foreign substances in food as a question of New Jersey law. However, we find it unnecessary to pursue this subject because in our view the case turns on a fact question distinct from any dispute as to the extent of liability.

The area of controversy is narrow. Plaintiffs [2] [properly concede that they] have no right to recover if the injury was inflicted by a whole chicken bone contained in defendant's product. For it is undisputed that bones are normally left in chicken as cut up for fricassee, and this fricassee was not held out to be boneless. Plaintiffs do

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[1] At the start of the trial plaintiffs' counsel stated his theory to be that the injury was caused by a splintered chicken bone or some other foreign body. The court insisted that he limit his theory to one of splintered bone, yet later permitted the jury to consider the possibility of some other injurious hard foreign substance. But plaintiffs seem not to have been prejudiced by this change of position, since their counsel did not indicate then and has not indicated since that he had any additional evidence to show the presence of a non-bone foreign body. The injurious object was not recovered. That very fact is some indication that it was bone, which the stomach could have dissolved.

[2] The following words "properly concede that they" appeared in original opinion of Hastie, C. J., but were removed upon application for a re-hearing by letter from Hastie, C. J., to the Clerk of the United States Court of Appeals dated June 21, 1955.

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complain, however, that the court's charge precluded any recovery for injury caused by a splintered fragment of chicken bone, negligently left in the fricassee and not reasonably anticipated by the consumer.

We do not reach the question of the processor's liability for an injury caused by a splintered chicken bone in fricassee, because we do not find any evidence from which the jury could rationally have inferred that the injurious substance was a chicken bone splinter. The two doctors who examined plaintiff wife at the time of the injury or soon thereafter were witnesses. Their testimony points to no greater probability that the injury was caused by a splintered fragment of bone than by a whole bone or some other object. Plaintiffs' principal contention is that the jury might have inferred that the injurious substance was a splintered bone from the wife's testimony that the only chicken fricassee she ate was a single morsel not more than an inch in length. It is argued that this morsel must have contained the injurious object, and that from its size the jury could properly infer that the object was a splintered fragment of bone, rather than an entire bone. However, no proof was offered to supply an anatomical basis for this inference. To the contrary, we take judicial notice of the fact that a chicken contains many small bones less than an inch in length. For familiar example, the bony structure includes sixteen distinct cervical vertebrae. *Hyman, Comparative Vertebrate Anatomy,* 2d ed. 1942, 121.

In these circumstances it would have been mere speculation, and therefore improper, for the jury to have concluded that a splintered bone caused the injury. The party who bears the burden of proof is not entitled to submit alternative possibilities to a jury for speculative choice among them when the record supplies no evidentiary basis for choice by logical inference. *Woschenko* v. *C. Schmidt Sons,* 1949, 2 N. J. 269, 66 A. 2d 159; *Dunn* v. *Hoffman Beverage Co.,* 1941, 126 N. J. L. 556, 20 A. 2d 352; *Simpson* v. *Duffy,* 1952, 19 N. J. Super. 339, 88 A. 2d 520.

The judgment will be affirmed.

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Opinion Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LILLIAN AGNES WIELAND and
CHARLES L. WIELAND,
Plaintiffs-Appellants,

v.

C. A. SWANSON & SONS,
Defendant-Appellee.

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges.

On Petition for Rehearing.

O'BRIEN, DRISCOLL & RAFTERY, New York City (GEORGE A. RAFTERY, New York City, of counsel), for plaintiffs-appellants.

Per Curiam.

Petition for rehearing denied.

C. E. C.,
J. N. F.,
W. H. H.,
C. JJ.

Filed June 23, 1955.

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Office - Supreme Court,
FILED
AUG 9 1955
HAROLD B. WILLEY,

No. 306

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

June Term, 1955

Civil No. 56-249

UNITED STATES COURT OF APPEALS
FILED
JUN 13 1955
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

LILLIAN AGNES WIELAND and CHARLES L. WIELAND,
Plaintiffs-Appellants,

against

C. A. SWANSON & SONS,
Defendant-Appellee.

PETITION FOR RE-HEARING

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

LILLIAN AGNES WIELAND and CHARLES L. WIELAND, the plaintiffs-appellants above named, present this, their petition for a rehearing in the above-entitled cause, and, in support thereof, respectfully show:

I

The Court in its opinion of affirmance has clearly failed to recognize that the plaintiffs' proof was sufficient to present a jury question as to negligence of defendant in the preparation of its canned product. A jury should have been logically permitted to infer want of due care by the defendant as to whether the defendant's negligent preparation resulted in the presence of 1) a splintered

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bone, 2) a small, regular, hard, sharp bone, or 3) any other foreign substance not expected to have been found in the small, unattached piece of white meat, less than one inch in diameter, which was testified to by the plaintiff as having been ingested.

II

The Court in its opinion of affirmance erred when it concluded that the record and proof herein supplied no evidentiary basis for a logical inference by a jury. The basic fact was clearly established. The proof conclusively developed the *effect* from the swallowing of a piece of unattached white meat, less than one inch in diameter, followed by immediate gagging, the almost immediate X-ray examination of the esophagus, the determination "foreign body in the esophagus", the subsequent testimony of the physicians that such an injury could only have been caused by the "hard, sharp cutting of a foreign body", the interrogatories procured and introduced by the plaintiffs as to the preparation of defendant's products, and the absence of explanation or defense on the part of the defendants. From the proof adduced, an inference could logically be drawn by a jury that the cause of the *effect* testified to came from the defendant's can; that the defendant's can was defectively packed and thus constituted negligence which was the proximate cause of plaintiff's injury.

III

The Court erred further when it concluded that under the circumstances herein plaintiff's proof constituted the submission of alternative possibilities to a jury for speculation. The element of speculative choice in the submission of alternatives to a jury only arises when the injury complained of could have been occasioned by one of two causes, for one of which the defendant would not be responsible. The plaintiffs' proof adduced here presents no such problem. The defendants could logically be held

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responsible for negligence in the packing of their product whether the injury was caused by a small bone in any shape or form, splintered or regular, or any other foreign substance, so long as it was imbedded in the small, unattached piece of white chicken meat less than one inch in diameter and unexpected to be found therein. The plaintiffs' proof herein clearly shows that the jury should have been allowed to draw a logical inference from the proven fact and that the nature of the foreign body ingested was not speculative but a proper determination of fact for a jury.

In *Schumann* v. *Horn & Hardart Packing Company,* 8 N. J. Super. 153 (App. Div., 1950), the Court stated:

> "• • • the law imposes the burden of proof upon the plaintiffs and this burden must be sustained by showing circumstances from which the defendant's negligence is a reasonable and legitimate inference. In the discharge of this burden, if the plaintiffs produce any facts which justify such an inference when viewed, as they must be, most favorably to their contention, then the case should have been sent to the jury for determination."

And in *Austin* v. *Penn. R.R. Co.,* 82 N. J. L. 416, 81 A. 739, the Court stated:

> "All that is required is that the circumstances should be so strong that a jury might properly on grounds of probability rather than of certainty exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and when probability may be all that is attainable."

IV

The Court in its opinion of affirmance erred when it concluded that plaintiffs conceded that they had no right to recover if the injury was inflicted by a whole chicken bone contained in defendant's product.

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What the plaintiffs did concede was that bones are normally left in chicken parts when cut up for fricassee, but further are only expected in those parts that they are inherently found in, that is, a leg, wing, etc. Plaintiffs did contend that a small bone less than an inch long, regardless of shape or form, is not expected to be found in an unattached piece of chicken less than one inch in diameter, which was ingested by plaintiff herein.

V

The three cases which the Court cited as controlling authority in its opinion of affirmance herein are clearly distinguishable from the case at bar. They are distintinguishable on their proofs both as to the law and facts therein.

The case of *Woschenko* v. *C. Schmidt & Sons* (1949), 2 N. J. 269, 66 A. 2d 159, was an action by a guest at a party for injuries received when a barrel of beer, brewed by one defendant and sold by another distributor defendant, exploded.

The issue clearly defined was, assuming negligence on the part of both defendants, was the proof sufficient to present a jury question as to whether the negligence of either or both was the proximate cause of the accident? The Court held that there were many palpable and efficient agencies intervening between the defendant's alleged dereliction and the injury, and that therefore the chain of causation was broken. Further, the Court held that the plaintiffs presented no proof as to certain items, such as pressure in the barrel, etc., and that the accident could have been the probable cause of the negligence of either of the defendants and therefore the jury was left in the realm of speculation.

The case of *Dunn* v. *Hoffman Beverage Co.* (1941), 126 N. J. L. 556, 20 A. 2d 352, was an action against a manufacturer and bottler of carbonated beverages for injuries

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caused by the bursting of a bottle some time after its purchase from the retail dealer, and where it appeared from the testimony adduced that the bottles after they passed through the defendant's processes would not burst unless there was careless handling from the warehouse to the retailer, or in handling by the retailer. This case turned on the speculative item of intervening factors breaking the chain of causation. Plaintiff offered no proof as to the length of time the bottle was in the custody of the retailer at the time of resale, or as to the condition of the bottle at the time of purchase, how it was kept, or what, if anything, happened to it from the time it was delivered up to the time it was sold to the infant plaintiff therein. The Court held, after considering a full defense by the defendant as to its bottling processes and testing, etc., that it was just as probable to infer that the strength of the bottle had been weakened while in the custody of the retailer as it was to infer that the defendant had been negligent in the bottling.

The case of *Simpson* v. *Duffy* (1952), 19 N. J. Super. 339, 88 A. 2d 520, was an action against a self-service market for injuries sustained by plaintiff when she allegedly slipped on a vegetable leaf on the floor and fell. The plaintiff's proof failed to establish notice as to the length of time the leaf was on the floor in order to have been discovered and removed if the defendant had exercised its duty of reasonable inspection. Intervening factors again were held to have been the cause of speculation for the jury as to the proximate causation and responsibility.

It can be observed that the above authorities relied on by the Court in its opinion of affirmance are distinguishable from the proof in the case at bar. The proofs adduced in those cases present the alternative possibility of one or the other of actual or potential defendants being responsible for the cause of injuries, forming an insufficient evidentiary basis for choice by logical inference. In addition thereto is the presence of intervening agencies cutting the

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chain of proximate causation and ground for speculation as to the ultimate responsibility. The case at bar is a canned food case with but a single packer defendant involved. This defendant exercised actual control over the contents of its product until the opening of the can; its preparation remained undisturbed. The case at bar is more in line with the following New Jersey cases, which are cited and discussed in the three cases regarded as controlling by the Court and distinguished therein.

Taylor v. *Berner,* 7 N. J. R. 597, 146 A. 674 (Sup. Ct., 1929), aff. Err. and App. 1920, N. J. L. 469, 150 A. 371.

Healy v. *Trodd,* 124 N. J. L. 64, 11 A. 2d 88 (Err. and App. 1940).

VI

The Court in its opinion of affirmance herein has clearly failed to apply the various rules and tests of leading food cases regarding the sufficiency of proof as a basis for a logical inference of negligence.

In the leading New Jersey case of *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748, 70 Atl. 314, the Court stated:

> "Canned goods are at the present day in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test either of the retailer or of the customer until they are opened for use, and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption he in effect represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon the label. Under these circumstances the fundamental condition upon which the common-law doctrine of caveat emptor is based—'that the buyer should look out for himself'—is conspicuously absent, for he has no opportunity to look out for himself. And when he thus buy

> and eats and contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result, from general and fundamental principles, that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and are not unwholesome and poisonous."

And in another leading food case, *Bissonett* v. *National Biscuit Co.*, 100 Fed. 2d 1003, the Court stated at page 1005 in regard to the burden of proof in a food case:

> "Usually the burden of proving the negligent acts of a defendant is upon the plaintiff. Under some circumstances, the quantum of proof which a plaintiff must supply is lessened. This is particularly true where the facts before the court show that there is a small degree of probability that a plaintiff's actions were responsible for the injury and that the article consumed was exclusively in control of the defendant."

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Petitioners and Plaintiffs-Appellants.

Certificate of Counsel

I, GEORGE A. RAFTERY, a member of the firm of O'BRIEN DRISCOLL & RAFTERY, attorneys for LILLIAN AGNES WIELAND and CHARLES L. WIELAND, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

GEORGE A. RAFTERY.

FILED
SEP 30 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

No. 306

LILLIAN AGNES WIELAND and
CHARLES L. WIELAND,

Petitioners,

against

C. A. SWANSON & SONS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BREED, ABBOTT & MORGAN,
Attorneys for Respondent,
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New York 5, N. Y.

SUMNER FORD,
J. CHRISTOPHER MEYER, JR.,
THOMAS W. KELLY,
Of Counsel.

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